ASSISTANT COMMISSIONER DERECK MATSIKA
versus
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 27 FEBRUARY 2017 AND 23 MARCH 2017

Civil Appeal

Ms H Makusha Moyo for the appellant
Ms R Hove for the respondent

MATHONSI J: This matter should not have been set down on the roll for criminal appeals because it is simply not one. It is a civil matter in which the appellant, as a member of the Police Service-he was a medical doctor holding the rank of Assistant Commissioner in the Police Service – was subjected to Police disciplinary law. He was charged with contravening Paragraph 35 as read with s29 of the Police Act [Chapter 11:10], that is acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the police force.

When sitting to hear the matter the court *a quo* was enforcing disciplinary law as provided for in s193 (b) of the Constitution, in that disciplinary charges preferred against a member of the Police Service in terms of the Act are in essence civil in nature. It is for that reason that in terms of s30 (5) and s34 (9) of the Police Act, where a member has been convicted under the Act that conviction does not give rise to a criminal conviction or record in terms of any other law.

At the commencement of the hearing of the appeal, and after exchanging views with both counsel, it was agreed that although we would hear the appeal sitting as a criminal appeal court, the matter remained a civil appeal.

The allegations against the appellant were that while employed as a Senior Officer in the Zimbabwe Republic Police, he was the government Medical Officer at Police Camp Hospital, as such subject to Police Discipline, the appellant supplied pethidine to certain individuals who approached for supply who approached him for supply during the period extending from February 2009 to July 2011. Pethidine is a specified dangerous drug listed in the 4th Schedule of

the Dangerous Drugs Regulations, 1975. The end users of the drug allegedly supplied by the appellant abused it as the drug is addictive. Apart from the fact that it was improper to supply the drug, he also sold quantities ranging from 1 vial to 10 vials at a time which is also beyond the regulated dosage for a single patient. The drug should not be supplied to patients but administered by a qualified person.

Although the appellant denied the allegations and put up a strong fight during a lengthy trial, he was found guilty by the court *a quo* and fined $500-00 or in default of payment 2 years imprisonment on 30 May 2013. He was aggrieved by that turn of events and noted an appeal to this court against both conviction and sentence. The grounds of appeal are lengthy but the essence is that the state failed to prove its case against the appellant "beyond reasonable doubt" in respect of all the counts of allegedly supplying the regulated drug and that the court *a quo* erred in rejecting his credible evidence relating to his participation.

Regarding sentence the appellant attacked it on the ground that it is excessive in the circumstances as to induce a sense of shock. The court *a quo* paid lip-service to the various factors in mitigation that were outlined including that he was subjected to a criminal trial and acquitted. The trial under the Police Act constituted double jeopardy so to speak.

The court *a quo* took evidence from Trynos Shana a detective police constable attached to CID Drugs and Narcotics Section who intercepted the appellant at the parking lot at Barclays Bank Belmont Branch in Bulawayo as he proceeded to deliver a supply of pethidine to Bennice Rensburg (a user). A trap had been set for him which involved Rensburg calling the appellant and placing an order for a quantity of the drug. She had allegedly been supplied by the appellant before. She parked her Mazda B 1800 motor vehicle waiting for the appellant's arrival while the witness and his colleague lay in ambush. At that point they did not know they were trapping a senior police officer and did not know the appellant.

This witness testified that the appellant arrived and disembarked from his motor vehicle before walking towards Bennice Rensburg's motor vehicle. It was then that the witness intercepted the appellant who was holding a box in his right hand containing "about 10 ampulse of pethidine." He was arrested but later released when the officers discovered he was in fact a police officer holding a much higher rank than them. In police discipline constables have no power to arrest a senior officer.

Doctor Anna MoJamu spoke of how and why the drug is controlled. She testified that pethidine is a narcotic pain killer which is stored under strict rules and conditions. It can only be dispensed by authorized persons where there are emergency facilities. A doctor administering the drug must write a prescription to request it from the Dangerous Drugs Cupboard. The pharmacist dispensing it must enter the name of the patient and other details in a Dangerous Drugs Register and the name of the issuing doctor before dispensing it. It is only injected at a hospital or other medical facilities by a qualified person.

Those who testified as having purchased pethidine from the appellant or being injected with it by him are: Rungano Murambadare Zivanai of Kwekwe, Lee Anne Roberts of Bulawayo and Thomas Kazembe of Kwekwe. They said the appellant was selling them the drug at his residence, doctor's rooms, in his car, Café Baku, his wife's flat in Gweru and Midlands Hotel among others. On occasions he would inject them anywhere including his car, Midlands Hotel and Police Officers' Mess.

Although the drug is to be administered at a medical institution and kept at an approved place, the appellant did not comply with those rules. While the drug is to be administered by a qualified person like a doctor or a nurse under the supervision of a doctor, the appellant gave those that he supplied large quantities of the drug to inject themselves. The appellant denied the allegations but surprisingly admitted knowing and indeed dealing with Bennice Rensberg, Rungano and Roberts.

Rungano and Roberts testified that the appellant supplied them with pethidine. It is not clear why they would falsify information about him. Although the appellant denied even knowing Kazembe, that witness intimately knew him including where he resided, the vehicles he drove and the name of his wife who also allegedly peddled the drug on the appellant's behalf as well.

The evidence of Rungano Murambadare Zivanai is recorded in part at p43 of the record as:

"Q. How do you know Dereck?

A. He used to sell pethidine to me. I had a car accident in 2008 where I was admitted at Mater dei and pethidine was used to me for 2 months or so and unfortunately I got addicted to it. Early 2009 I met Dereck Matsika through a friend. I would travel

> from Beitbridge to Bulawayo almost on a daily basis. He sold me pethidine from 2009 up until last year when I quit and I moved to Kwekwe after I left my work and he told me he could supply me through his wife Linda Kamuzambara a doctor at Gweru Hospital. I kept on buying from Linda and I introduced Gladmore Mapanda, John Nyasha Mapanda and Thomas Kazembe and we continued up until my parents took me to rehabilitation in Harare that was around May last year. After rehabilitation I came and tried to talk to my friends about it but they did not listen. One night they called me to go with them to Gweru and I refused and they had an accident coming back and John passed away."

This witness went on to say that he would meet the appellant for the purpose of transacting in pethidine at his flat. The appellant would inject him with one vial of pethidine in his "white 306" motor vehicle after he bought 20 vials for $200-00. He would take the rest home to inject himself.

Lee Anne Cathy Roberts testified that the appellant administered pethidine on her at his rooms both at the Eye Clinic and at Galen House and at his flat. They also transacted in his "car, a white peugeot" while the appellant was in police uniform. After purchasing the drug from the appellant she would inject herself. When she relocated to Gweru, the appellant gave her the contact details of his wife Linda to continue receiving supplies through her. She would see Linda at the doctors' quarters in Gweru to buy quantities of the drug.

Thomas Kazembe Musiiwa stated that on his first encounter with the appellant he injected him and his friends in his silver Mazda 6 motor vehicle parked outside Midlands Hotel in Gweru. His further testimony is recorded as follows at p82 of the record:

"Q. Who injected the pethidine?

A. Mr Matsika by Midlands Hotel.

Q. Where was it injected?

A. My right shoulder in Mr Matsika's motor vehicle.

Q. Thereafter anymore dealings with accused?

A. Yes, I met Matsika for the second time he was at his wife's place Linda Kamuzangaza. We left our car at his place and got into the Mazda 6 Grey I mentioned. It was me, Gladman and Sinfree Rungano. Thereafter we went to a

place which appeared a police (mess) and inside the gate Matsika parked on the immediate left.

Q. What is the name of the police station?

A. No it was at night

Q. What city?

A. In Gweru, inside there and that the place was for the police as we saw 2 officers getting out of the station even Mr Matsika told us not to be afraid as he was a boss so we should not fear no one would approach him to question him. Then he took out syringes and then he pulled pethidine into a syringe. The three of us were injected, Sinfree, Gladman and I.

Q. Where were you?

A. When we were parked in the car by the officers [mess] then we left the motor vehicle and went to Matsika's place and we took our car and returned back to Kwekwe--"

He went on to say that while in Bulawayo with his friends the appellant had supplied them with a box of pethidine at Dickies Restaurant as they were having a meal.

Doctor Walter Mangezi, a psychiatrist who examined the witnesses who testified against the appellant at Parirenyatwa Hospital, told the court that pethidine has a window period of 4 hours for it to be picked after the last use. The doctor certified that both Roberts and Kazembe were of sound mind and fit to testify before the court. He did not examine Zivanai, who had long been rehabilitated by the time he testified.

Although the appellant denied all the allegations leveled against him, the court *a quo* was not impressed. It accepted though that some of the witnesses, like Roberts were "confused," Thomas Kazembe "could not be relied upon in respect of what happened after he was injected." However the witnesses corroborated each other on "material aspects of similar extensive knowledge" of the appellant, how much this product cost and the range of quantities sold including the use of his wife Linda as an agent.

The court *a quo* believed the state witnesses and disbelieved the appellant. It concluded that;

> "Considering now standing orders have been put in place and the code of conduct clear as well as the Police Act a police officer is bound to good discipline whether or not in police uniform and even after hours. The police endow whosoever they deem fit with title and if it is police title such remains above any other professional calling. While a doctor those who subject themselves under police title should consider themselves peculiar considering it is disciplined force and professionals who seek such further title ought to abide by the strict ethical conduct so required. Infact the police is responsible for guarding society and every other profession including itself hence the reasonableness so demanded of good conduct beyond that of a common man on the street or else what discipline would be spoken of? Beyond reproach, beyond suspicion and any act of association or unexplained use of dangerous drugs is and will be deemed unbecoming or reasonably deemed likely to bring discredit to the police force."

Ms Makusha Moyo who appeared for the appellant attacked the conviction from mainly two fronts namely that the drug sold or administered to the victims by the appellant was not taken to the laboratory for testing. For that reason the state failed to prove an essential element of the offence given that it could not be said with any degree of certainty that the drug involved was pethidine. It is trite that an appeal is determined from the four corners of the appeal record and therefore that a party cannot rely on a defence which was not relied upon at trial. The appellant cannot lawfully raise on appeal, a defence which was not placed before the court of first instance whose judgment is sought to be impugned on appeal.

Looking at both the appellant's defence outline and his evidence presented before the court *a quo* nowhere whatsoever does he raise the defence that what he administered or indeed sold to the victims was not pethidine. In fact that argument is not even advanced as a ground of appeal in the notice of appeal. Neither is is advanced in the heads of argument. *Ms Makusha Moyo* could therefore not be allowed to spring a surprise, a completely new case, on appeal. Nothing more needs to be said about that issue.

Secondly *Ms Makusha Moyo* submitted that the appellant interacted with those of his accusers which he admitted dealing with in his capacity as a doctor in private practice and not as a government doctor holding the post of Assistant Commissioner of Police. For that reason he could not be charged under the Police Act. The witnesses who testified against him saw him as a doctor in private practice and not as a police officer. In their eyes he did not conduct himself in an unbecoming or disorderly manner or in anyway prejudicial to good order or discipline or reasonably likely to bring discredit to the Police Force as to breach the provisions of paragraph

35 of the Schedule to the Police Act. Reliance was placed on the authority of the case of *S* v *Pearce* 1982 (2) ZLR 303.

In that case SQUIRES J expressed the following view about unbecoming conduct at 307 C-E;

> "Now, in the first place, whether conduct is 'unbecoming' or 'reasonably likely to bring discredit to the Force' seems to me to be very much a matter of degree. And, secondly, it must surely be conduct that is objectively known to, or discernible by, someone else who is affected or offended by it, that is to say, someone to whom it is unbecoming or in whose eyes the Force is thereby brought into discredit. In the same way as the utterance or publishing of defamatory words do not constitute defamation unless there is publication to some audience, so someone must be aware of the conduct in order for the Force to be discredited or for it to be thought unbecoming or disorderly. In the present case, no one knew of the accused's act in borrowing the table and chairs, not even retrospectively on receipt of the letter,"

The court quashed the conviction in that matter because noone knew of the unauthorized borrowing of the property by the police officer. The custodian of the property did not even know that the chairs had been taken and did not even identify them. The police officer had also written a letter to Masvingo showgrounds after packing the property for another horse show in Bindura, to say that he had taken the items for use and would return them in a week or two.

In my view that matter is distinguishable from the present one in that in this case there were victims affected by the appellant's conduct. Roberts even waited for him in town while he was still engaged at Ross Camp. Although her evidence in that aspect was discredited because she could not describe the police uniform he was wearing she was attended to by the appellant while he was in police uniform. Kazembe and his colleague were injected with pethidine at a police camp.

In terms of s29 of the Act a member who contravenes any provision of the Act or an order made there under or who commits an offence specified in the schedule shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment. Section 29A allows such a member to be tried by a magistrate court as happened in this case. In terms of paragraph 35 of the Schedule to the Act it is an offence if a member of the Force is found:

> "Acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police Force."

Ms Makusha Moyo for the appellant submitted that by putting a comer between "unbecoming" and "or disorderly manner" in her judgment the magistrate gave that provision a different meaning which was a misdirection. In my view that is a trifle and should not detain the court in any way. Whatever rule of statutory interpretation one applies, the effect of that provision remains the same. This is because the words "unbecoming" and "disorderly" are separated by the word "or." Therefore they are disjunctive, the word "or" serves the purpose of separating or disconnecting those two words. Nothing is therefore gained by the appellant from that endeavor.

In my view the trial under the Police Act is disciplinary in nature and therefore designed to regulate members' conduct. To the extent that it is disciplinary law one must relate with it having regard to the fact that the Police Service is an arm of security services constituted in terms of Chapter 11 of the Constitution. Section 208 (4) of the constitution actually prohibits serving members of the security services from being employed or engaged in civilian institutions except in periods of public emergency.

The appellant was not only running his own practice as a doctor while holding the position of a senior police officer, he was shown to have sold and administered a controlled dangerous drug in violation of the law and the dictates of the medical profession. The Police Service is often colloquially referred to as "the disciplined or uniformed force" for a reason. It is that discipline is administered strictly and the conduct of its members is strictly regulated. The enforcement of discipline is the cornerstone of Police Service and can never be compromised. If it were to be compromised there would be dire consequences to national security.

It is for that reason that the conduct of members is regulated 24 hours a day. The jurisdiction of police authorities, in particular the Commissioner General, to command, control and superintend the Police Service in terms of the Act, cannot be ousted depending on the time of the day or the geographical location of a member at any one time. He has command, authority and control of his subordinates throughout.

In the present case, the appellant was misbehaving all over the place. He was openly selling pethidine to various people from his motor vehicle, his flat, his wife's lodgings, at food

outlets. He was injecting victims with pethidine in his vehicle, outside a hotel and at the parking lot of a police mess. He even bragged that even as he did that at a police station nobody could touch him because he was "the boss". This is a drug that should not be handled that way. It is regulated and must be kept in a dangerous drug cupboard to be removed and administered in a particular way at a medical institution with emergency facilities by a qualified person in controlled quantities.

The appellant was intercepted at a parking zone outside a bank with a box of the dangerous drug in his hand as he was about to sell it to a patient who had phoned to place an order there and then. What kind of a police officer was this? One might add, what kind of a medical doctor is this? Whether as a doctor in private practice or not it was wrong to handle the drug that way and to splush it like confetti at a wedding with reckless abandon.

The court *a quo* rightly pointed out that as a police officer he was bound to maintain discipline whether or not in police uniform and even after hours. The manner in which he conducted himself did not meet the standard expected of a police officer. In fact he had become rogue. It matters not that he did this away from police premises, in fact he did on one occasion at the officers mess in Gweru.

There is no doubt in my mind that this was unbecoming conduct. It was prejudicial to good order or discipline expected of a police offer. It brought discredit to the Police Force. He was properly found guilty of violation paragraph 35 of the Act. In fact there could only be one outcome following the evidence that was led against him. The appeal against conviction is spectacularly without merit.

Ms Makusha Moyo did not pursue the appeal against sentence perhaps upon a realization that the sentence of a fine of $500-00 or 2 years imprisonment for an offence of this nature was just a slap on the wrist.

In the result, the appeal against both conviction and sentence is hereby dismissed.

Takuva J agrees……

Dube-Banda, Nzarayapenga & Partners, appellant's legal practitioners
Attorney General's Office, respondent's legal practitioners